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Br. of Locke for Pl. in Err.

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# Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 265.

IOWA LIFE INSURANCE COMPANY,

PLAINTIFF IN ERROR,

v.

LULA T. LEWIS.

In Error to the Circuit Court of the United States for the Northern District of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

BY MAURICE E. LOCKE, DALLAS, TEXAS.

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# Supreme Court of the United States.

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| Iowa Life Insurance Company, Plaintiff in Error, v. Lula T. Lewis. | 18,072. October Term, 1901. No. 265. |

Brief for Plaintiff in Error.

## PRELIMINARY STATEMENT.

Lula T. Lewis brought this action against Iowa Life Insurance Company in the District Court of Tarrant County, Texas, whence the defendant removed it upon the ground of diverse citizenship to the Circuit Court of the United States for the Northern District of Texas, sitting at Fort Worth (Tr., 8). The plaintiff sued in part (Tr., 13), and was allowed by the court (Tr., 39), to recover certain damages and attorney's fees by virtue of a statute of the State of Texas, which the defendant claimed by demurrer (Tr., 17) and exception (Tr., 39) to be in contravention of the constitution of the United States. Be-

cause of this constitutional question, the defendant has brought the entire cause directly to this court by writ of error under the provisions of Section 5 of the act of 1891 (Loeb v. Trustees of Columbia Township, 179 U. S. 472).

The purpose of the action was to recover the amount of a policy of insurance issued by the defendant upon the life of the plaintiff's husband, together with the statutory damages and attorney's fees. The questions involved in the main issue were two: whether the fact that the plaintiff had furnished the defendant no proofs of death barred her present action, and whether, before the death of the assured, the policy had become null by reason of the non-payment of a premium note. The court instructed the jury to return a verdict for the plaintiff, which it accordingly did.

## ERRORS ASSIGNED.

1.

The court erred in overruling the defendant's first special exception to the plaintiff's first amended original petition, said exception constituting section 3 of the defendant's third amended original answer.

2.

The court erred in overruling the defendant's second special exception to the plaintiff's first amended original petition, said exception constituting section 4 of the defendant's third amended original answer.

3.

The court erred in refusing to permit the defendant to prove by the witness S. E. Starn, that before

the delivery of the policy sued upon, and the premium receipt which accompanied the same, the form of the contract of insurance which the insured was to receive was fully discussed between himself and said witness, and that it was agreed and understood that as a part of his contract of insurance the insured was to receive such a receipt as was delivered to him, all as shown by the defendant's exception No. 1.

4.

The court erred in refusing to give to the jury the defendant's requested special charge No. 1, in words as follows:

"You are instructed that under the undisputed evidence the plaintiff is not entitled to recover, and that therefore you should return a verdict for the defendant."

Said refusal is erroneous, because, under the undisputed evidence, the defendant was entitled to have a verdict directed in its favor.

5.

The court erred in charging the jury in words as follows:

"The first question to dispose of is as to whether or not the provision as to the payment of the note at maturity—it being provided on the back of the receipt for the note that the policy shall cease and determine if the note is not paid at maturity, is a provision of the contract entered into by and between the Iowa Life Insurance Company and Thomas M. Lewis; whether Lewis and his beneficiary are to be bound by that provision on the back of the receipt as a part of the policy of insurance.

"The question is not without its difficulties, but from the light which I have before me, and after lis-

tening to the argument of counsel, I am of the opinion that the provisions on the back of the receipt are not a part of the contract; that the contract, by its own explicit terms, is wholly included in the policy—the life insurance proper and in the application for such life insurance policy, which, by the terms of the policy is made a part of the contract. This is recited to be the case in the face of the policy and on the back of the receipt itself. Under the provisions and stipulations of these two instruments, by the passing of the insurance policy to the deceased and the note of the deceased and his promise to pay to the insurance company, the minds of the insurance company and the deceased met, upon the conditions and provisions of the note, contract and the application for the insurance, which made a part of the contract. In the opinion of the court there was no meeting of the minds, or agreement between the parties as to the provision upon the back of the receipt. Such provision is nowhere noted in the face of the contract of insurance; it is nowhere noted in the application for insurance, and the only place it is found is upon the back of the receipt, no reference being made to any such provision elsewhere.

"Even if this provision were considered a part of the contract entered into between the parties, yet it is such a provision, as to be taken advantage of would require affirmative action on the part of the company; that is to say, when the note was not paid at maturity, the company should have within a reasonable time thereafter, notified the insured that in view of the fact that his note given in part payment of the premium upon the policy had not been paid, the policy, which was issued in consideration of such note, ceased and determined. There is no evidence that

any such action was taken on the part of the insurance company. It has been held by authority of weight and respectability, that this would be the necessary steps for the insurance company to take, were the provision which is contained on the back of this receipt contained in the face of the note given by the insured to the company in part payment of the premium. I can understand why the insured should be bound by provisions incorporated in the face of his note, because that note bears his signature, and in so far as it bears his signature it must be his act, and therefore, he himself has agreed to the provision. He signs his own note understandingly and wittingly. Even in that case, however, as I have stated the law as it has been held by courts of weight and authority, is that the company must notify the insured of the non-payment of the note, and that the policy, because of such non-payment has ceased and determined, and that they will no longer be liable thereunder.

"Therefore, on the first branch of this case, or rather the first question, the court has reached the conclusion that the fact that the assured did not upon the maturity of the note pay it, does not lapse the policy, and that it was in effect thereafter. It seems to me that the attitude of the company itself bears out this conclusion, because it being the possessor of the note with knowledge of the date of its maturity, placed it in the hands of a local bank for collection and permitted it to remain there after the date of its maturity, with the bank making its usual and customary efforts to collect the same. This was done with the tacit consent of its agent, Mr. Starns, to whom the note was sent for collection. This note, as has also been said by counsel, is of the highest

negotiable character and needed only the solvency of the individual whose name was appended thereto, to make it as good as currency."

Said charge was erroneous for each of the following reasons, to-wit:

(*a*) In law the provision for forfeiture contained upon the back of the receipt given to the insured for his premium was a part of the contract between himself and the defendant, and binding upon the plaintiff.

(*b*) The provision for forfeiture upon the back of the premium receipt given to the insured was a part of the contract, and by its terms entitled the defendant to have the policy considered forfeited by virtue of the non-payment of the premium note at its maturity, without affirmative action on the defendant's part.

(*c*) It appears from the undisputed evidence that the premium note represented a little less than half of the amount of the first annual premium, and that at the maturity of the note a little more than half of the first policy year had expired; wherefore, the note had been fully earned and the defendant was entitled to keep it and collect it, and at the same time enforce forfeiture for its non-payment at maturity.

6.

The court erred in charging the jury in words as follows:

"There is a provision in the face of the contract of insurance that satisfactory proof of the fact and cause of the death of the insured must be received and accepted at the company's office in Chicago, Ills.,

under certain conditions and within the terms of the policy, before its liability will attach.

"I have narrated in a somewhat desultory manner, the evidence as to furnishing proof of loss, and it seems to me that under the terms of the contract of insurance, the company is made the judge of what shall be satisfactory proofs of death. The company says that upon receipt of satisfactory proof of the fact and cause of death, its liability will attach, in event it is liable under other conditions of the policy. It must determine for itself what it will accept as satisfactory proof. Therefore, it best knows what its regulations are as to proof of death. The attitude of the company in this respect (and I am not referring to the attitude of its agent, Mr. Starns, in Ft. Worth), but of the secretary and general counsel of the company, who unquestionably acted as its full representatives and agents; their attitude on the matter of proof of loss is such as to here in this case estop the company from setting up the absence of this proof of loss as a defense—setting up that proofs of loss have not been furnished, and that therefore their liability does not attach. When they are called upon to say whether or not they deny liability under this policy, and if not, to permit the representatives of the deceased to make proofs of loss, they practically refuse to furnish blanks for that purpose, and the general counsel says there is no such policy in effect on the books of the company. Construing the statements of their letters in a fair way, they are tantamount, to my mind, to refusing liability on this policy and certainly one would feel it futile to go ahead thereafter and make proof of loss under the circumstances the beneficiary did, not knowing what the company would construe as satisfactory proof.

It seems to me as a question of law, that the insurance company should be estopped from here setting up that provision of the policy as a defense to this action."

Said charge was erroneous, because there was no evidence before the court proper to serve as a foundation for a verdict that the defendant had waived its right to require the furnishing of proofs of death, in accordance with the contract, or been estopped from enforcing such right.

7.

The court erred in charging the jury in words as follows:

"This being the view of the court, it will be your duty to return a verdict for the plaintiff for the face of the policy, which is three thousand dollars, and also interest thereon at the rate of six per cent. per annum from the first day of January, 1900 and also 12 per cent. penalty on the three thousand dollars—not on three thousand dollars and six per cent. added thereto, but 12 per cent. penalty on three thousand dollars. Also for reasonable attorneys' fees for the prosecution of this suit, basing your judgment, of course, on the evidence which has been introduced on that point.

"This, therefore, leaves the jury but one question to determine, this the fixing of reasonable attorneys' fees for the prosecution of this suit."

Said charge was erroneous for each of the following reasons, to-wit:

(*a*) Article 3071 of the Revised Statutes of Texas, which alone purports to require from the defendant the payment of damages and attorneys' fees, is in contravention of the fourteenth amendment to

the constitution of the United States, in that it denies to the defendant, which is a person within the jurisdiction of the State of Texas, the equal protection of the law.

(*b*) There was no evidence before the court, showing that the plaintiff at any time before or after the institution of the suit, or otherwise than by the mere fact of suit, made demand upon the defendant for the payment of the amount due under the policy sued upon.

(*c*) There was no pleading or evidence before the court, showing that the plaintiff had paid any attorneys' fees, or become liable to pay any attorneys' fees; or if she had paid them or become liable to do so, to what amount.

## FIRST PROPOSITION,

## BASED ON THE SIXTH ERROR ASSIGNED.

The court erred in ruling that the plaintiff could maintain her action, notwithstanding the fact that no proofs of death had been furnished the defendant.

### STATEMENT.

The court charged the jury that the defendant was estopped from setting up as a defense the fact that no proofs of death had been furnished it; and the defendant duly excepted to the charge (Tr., 38-39).

The defendant's promise was to pay the sum insured within sixty days after receipt and acceptance, at its office in Chicago, of satisfactory proofs of the fact and cause of the death of the assured, within the terms of the policy (Tr., 24). No proofs of death were received by the defendant prior to the institution of the suit, and there was neither pleading nor proof

that any ever had been furnished; but the plaintiff relied upon a waiver thereof (Tr., 24 and 12-13).

S. E. Starn was the defendant's soliciting agent at Fort Worth, where the plaintiff and her husband resided. The application for the policy sued on was made through him. A few days after the death of the assured, which occurred October 7, 1899, representatives of the plaintiff requested Mr. Starn to furnish them blanks upon which to make proofs of death. He refused to do so; and as his reason for such refusal, he stated that he did not consider Mr. Lewis insured in the defendant company, as his policy was lapsed. The defendant had blank forms which it required claimants to use in making proofs of death, and which it furnished upon request for that purpose (Tr., 24).

Mr. Starn was an agent of the defendant company, but was not its president or secretary. His authority to act for it was granted and limited by a written contract and printed rules and instructions (Tr., 32-33). Both he and the secretary of the company testified that he had no authority other than that so prescribed; and the secretary testified especially that no duties ever had been imposed, or any authority conferred, upon Mr. Starn with relation to demanding or waiving proofs of death, or with reference to deciding whether the defendant was or was not liable to pay any specified policy of insurance (Tr., 33 and 34). There was no testimony to the contrary of this. The provisions of the contract and rules are fully set forth on pages 32 to 34 of the transcript. Neither document made it Mr. Starn's duty or privilege to represent the defendant in any matter pertaining to death claims or proofs of death. At the lower left-hand corner of the application for

the policy sued upon appear the following words, all being a portion of the printed blank, except the name of the subscribing agent:

"This risk is approved and recommended by

.....

Soliciting Agent.

[Signed] S. E. Starn,

General Agent."

A copy of the application, including said words, was attached to the policy. S. E. Starn's letter of March 5, 1899, to the defendant company, transmitting the application of Dr. Lewis for the policy, was written on a letter-head of the company, upon which the following words had been printed in red ink.

"S. E. Starn, dist. manager,
615 Grove Street,
Ft. Worth, Texas."

It was not shown that this letter-head or any similar one ever had been seen by the insured or the plaintiff (Tr., 35). The plaintiff did not plead that Mr. Starn was held out by the defendant as having authority to act for it in this matter, but pleaded that he had actual authority to do so (Tr., 12). The policy contains the following provision: "All agreements made by this company are signed by the president or secretary. This power will not be delegated. No other person can alter or waive any of the conditions of this policy, or issue permits of any kind, or make an agreement binding upon said company" (Tr., 31-32).

On January 4, 1900, Mess. Capps & Cantey, who were then and thereafter the attorneys of the plaintiff, wrote to the defendant a letter reading as follows:

Letter-head of Capps & Cantey.

"Fort Worth, Texas, January 4th, 1900.

Iowa Life Insurance Co., Chicago, Ills.

Gentlemen: Concerning your policy No. 30140 issued to Thos. M. Lewis for $3,000, registered March 4th, 1899, with Lula T. Lewis, Mr. Starns has stated to us that the company does not recognize any liability under the policy by reason of the death of Thos. M. Lewis and has refused to furnish proofs of the death. We take it, of course, that this is the stand which the company has taken in the matter and that he does so through advices from you, though we are of the opinion that it is perhaps due to Mr. Starnes and you as well that we confer direct with the home office, and have the declination to recognize the liability or furnish proofs of death proceed from that source. We have been retained to sue on the policy and will appreciate it if you will by return mail advise us of what stand you have taken in the matter. Thanking you in advance for prompt attention, we are, Yours truly,

[Signed] Capps & Cantey."

To this letter the defendant, through its secretary, R. E. Sackett, replied on January 15, 1900, by a letter reading as follows:

Letter-head of Iowa Life Insurance Co.

"Chicago, Jan. 15th, 1900.

Messrs. Capps & Cantey, Fort Worth, Texas.

Gentlemen: We beg to acknowledge receipt of your favor of 4th inst., the same being in relation to a certain insurance policy issued by this company upon the life of one Thomas M. Lewis and numbered 30140.

In reply we beg to inform you that this is a matter which should properly have the attention of our

general counsel, and as he has been ill for some days, and is just now leaving the city for a trip of a week or ten days, we shall have to defer making further reply to your communication until his return.

Very truly yours,

[Signed] R. E. Sackett, Secretary.

P."

On January 27, 1900, this action was brought in the District Court of Tarrant County, Texas.

On January 31, 1900, the defendant, through E. L. Barber, its general counsel, made further reply to Capps & Cantey's letter of January 4th, by a letter reading as follows:

Letter-head of Iowa Life Insurance Co.

"Jan. 31st, 1900.

Messrs. Capps & Cantey, Fort Worth, Texas.

Gentlemen: Your letter of January 4th to the Iowa Life Insurance Company before me, and to which I respond simply as a matter of courtesy.

How any one could imagine that Mr. Starnes would have anything to do with furnishing or refusing to furnish proofs of death of anybody under any circumstances, connected with this company, I do not understand. I would state that it does not appear by the books of the company that Thomas M. Lewis was a policy-holder in said company at the time of his alleged death. We are neither called upon to deny or admit any liability by reason of the fact that he may at some time have been a policy-holder in this company, that I am aware of. If you or any other person desires blank forms of this company upon which proofs of death are usually made, we will furnish you them with the utmost pleasure, not for the purpose of furnishing proofs of the death of Thomas M. Lewis nor any other person, but sim-

ply as a matter of courtesy, and you will have the right to make such use of them as you desire. This, we never refuse to any person and we expressly state that in furnishing such blanks, we neither admit or deny any liability of any supposed or alleged claim in the hands of the parties asking for such blanks.

Yours, &c.,

[Signed] E. L. Barber,
General Counsel."

No blanks for proofs of death were sent to Capps & Cantey by the defendant with either of its letters above copied or at any time (Tr.,24-26). The plaintiff did not plead the letter from E. L. Barber above copied (Tr., 12-13).

ARGUMENT.

It was rightly assumed by the trial court and the litigants that the defendant was under no obligation to pay the sum assured until after it had received, or had waived, the proofs of death stipulated for in the policy; and that as none had been furnished, the plaintiff's action must fail unless she could show a waiver thereof.

Worsley v. Wood, 6 Term Rep. 710; O'Reilly v. Guardian Mut. Life Ins. Co., 60 N. Y. 169; Bryant v. Commonwealth Ins. Co., 6 Pickering 131; Scottish Union & Nat. Ins. Co. v. Clancey, 83 Texas 113; McCormack v. North British Ins. Co., 78 Cal. 468.

But the court was mistaken in supposing that it was for the company to determine what should be accepted as satisfactory proofs, and that consequently it would be futile for the plaintiff to make proofs without knowing the company's requirements. The contract required "satisfactory proofs of the fact and

cause of death, within the terms of this policy." The company had no right of arbitrary decision. It was bound to accept as satisfactory any proof which was reasonably sufficient, any proof which ought to be satisfactory.

> Bunyon on Life Assurance, 490; 2 May on Insurance, §465.

Mr. Starn, when asked for blank forms on which to make proofs of death, refused to furnish them; and as his reason for such refusal he "stated that he did not consider Mr. Lewis insured in the defendant company, as his policy was lapsed" (Tr., 24). Such a refusal and statement, if made by the company, would be a sufficient waiver of proofs of death. But this was not the company's act. In the first place, the language used by Mr. Starn shows that he merely expressed his individual opinion, and did not undertake to act for the company in denying its liability. In the second place, Mr. Starn had no power to waive the proofs of death.

A principal is concluded by the acts of his agent under two states of fact, and no others. (1) He is so concluded when either expressly or impliedly he has authorized the agent to do those acts. (2) He is so concluded when he has clothed the agent with apparent authority to do those acts, and when the party seeking to hold him responsible, himself acting in good faith and with reasonable prudence, has so dealt with the agent in reliance upon such apparent authority that it would be unjust to him to permit the principal to deny that the authority was real.

The record contains no appreciable evidence that Mr. Starn's apparent authority in this matter in any way exceeded his actual authority. But if the fact were otherwise, it could have no significance here.

It is through estoppel that a principal is bound by the apparently authorized acts of his agent. Such an estoppel is available only when all its necessary elements are pleaded and proven. Apparent authority can not be shown under an allegation of actual authority; and it would not be sufficient if it were shown.

> Rail v. City Nat. Bank, 3 Tex. Civ. App. 557; Mutual Ben. Life Ins. Co. v. Collin Co. Nat. Bank, 17 Tex. Civ. App. 477.

The question then is, whether Mr. Starn had actual authority from the company to refuse proof-blanks and deny liability in its behalf. It is entirely clear that no such authority had been expressly conferred upon him, and almost equally so that none had been conferred by implication. His office was to solicit applications for life insurance and collect the first year's premiums thereon, and, subject to the company's approval, to appoint other agents having like duties. The printed instructions also authorized him to collect renewal premiums when receipts therefor were sent him, signed by the president or secretary. His compensation was a large commission on the premium of the initial year, and a small commission on the renewal premiums of the next ten years, for all business procured personally or through agents appointed by him. His contract forbade him to make, alter or discharge any contracts, or waive forfeitures, grant permits, or bind the company in any manner not therein expressly authorized; and the printed instructions contained a similar clause. The purpose of his agency was the procurement of new business and the collection of premiums. Evidently it was not essential to the due accomplishment of that purpose that he should be empowered to pass

upon the company's liability for death claims. The two functions are wholly distinct; they require for their performance different kinds of ability; and they are not necessarily or naturally associated. It has frequently been held that the soliciting agent of an insurance company has no implied authority to waive proofs of loss.

> Lohnes v. Insurance Co. of North America, 121 Mass. 439; Bush v. Westchester Fire Ins. Co., 63 N. Y. 531; Kirkman v. Farmers' Ins. Co., 90 Iowa 457; Knudson v. Hekla Fire Ins. Co., 75 Wis. 43; Smith v. Niagara Fire Ins. Co., 60 Vt. 682; Bowlin v. Hekla Fire Ins. Co., 36 Minn. 433.

Moreover, the policy contains the following provision, which is binding until shown to have been waived by the company: "All agreements made by this company are signed by the president or secretary. This power will not be delegated. No other person can alter or waive any of the conditions of this policy, or issue permits of any kind, or make an agreement binding upon said company."

> Globe Mut. Life Ins. Co. v. Wolff, 95 U. S. 326; Knickerbocker Life Ins. Co. v. Norton, 96 U. S. 234; Cleaver v. Traders' Ins. Co., 65 Mich. 527; Franklin Life Ins. Co. v. Sefton, 53 Ind. 380; Union Mut. Life Ins. Co. v. McMillen, 24 Ohio St. 67; Porter v. United States Life Ins. Co., 160 Mass. 183; Marvin v. Universal Life Ins. Co., 85 N. Y. 278; Catoir v. Am. Life Ins. & Tr. Co., 33 N. J. Law 487.

The next question is, whether there can be found in the correspondence between the plaintiff's attorneys and the defendant either an independent waiver

of the proofs of death or a ratification of Mr. Starn's act. The letter by which the attorneys began the correspondence (ante, 12) was a peculiar one. Its opening statement that Mr. Starn said the company did not recognize any liability under the policy is not borne out by the record. The only conversation on the subject of which there is any evidence, is one in which Mr. Starn gave merely his own opinion (Tr., 24). The letter clearly shows that its writers did not at that time rely upon Mr. Starn's action as binding the company, and that they wanted something which would be binding upon it. Perhaps it would be hypercritical not to assume that by proofs of death they meant blank forms for proofs of death. But even so, the court will observe that they did not ask for such forms. They said they had already been retained to sue on the policy; and any lawyer experienced in insurance litigation would much rather have a waiver of proofs of death than blank forms upon which to make such proofs. Accordingly, the only thing they asked was that the company inform them by return mail what stand it had taken in the matter,—that is to say, whether it denied liability. At that stage of the proceedings, it was not the company's duty even to determine upon its course, much less to communicate its determination to the plaintiff. Eleven days after the attorneys' letter was written, the company's secretary replied to it (ante, 12-13) by saying that the matter was one which should properly have the attention of the general counsel, and that as the latter had been ill for some days and was then just leaving the city for a trip of a week or ten days, further reply would have to be deferred until his return. Manifestly the secretary was right in saying that the matter was one which

should have the attention of the company's counsel. The letter came from lawyers who said they had been retained to sue, and was in its nature a veritable trap. If in response the company should deny liability, it would thereby waive proofs of death, and if it should ask for proofs of death it would thereby waive all known defenses; a true case of Scylla and Charybdis. The secretary did absolutely nothing but give a valid excuse for the company's delay in replying; and it is not claimed that the excuse was untrue in point of fact. Surely there was here neither an independent waiver of proofs of death nor a ratification of what Mr. Starn had done. Twelve days later, with no intervening change in the situation, suit was brought for the amount of the policy and about seven hundred dollars of statutory penalties; and there was an apologetic averment that the plaintiff could not afford to wait the time indicated in the secretary's letter because of the nearness of the February term of the court (Tr., 5). Judicial notice will be taken of the fact that there are two district courts in Tarrant County, with terms beginning on the second Mondays of April and May, respectively (Tex. Rev. Stat., Art. 22, Secs. 17 and 48). The plaintiff could bring her suit at either of these terms, unless perchance the company should decline to waive its contract rights. In that event, it would have sixty days in which to investigate the merits of the claim after receiving proofs of death.

In pursuance of the secretary's promise, when the general counsel returned he made full reply to the letter of the plaintiff's attorneys (ante, 13-14). His letter was written in Chicago, the next day after the citation in this action had been served upon the defendant's agent in Texas. Apart from any con-

sideration of its contents, there are two reasons why this letter cannot support the plaintiff's theory of waiver. It was not written until after the suit was instituted, and it was not pleaded. But if it had been received before the filing of the petition and had been duly pleaded, what is there in it that tends to make out a waiver? It first denies, not directly but in language as strong as a direct denial, that Mr. Starn had anything to do with the matter of proofs of death. This is not a ratification of his action. It next states as a fact that it does not appear from the books of the company that Mr. Lewis was a policy-holder at the time of his death. This is not a denial of liability. The company's books might show a premium past due and unpaid, when in fact its collecting agent had received and embezzled the money. They might show a premium past due and unpaid, when in fact an agent by whose acts it was bound had without its knowledge extended the time for its payment; and it is just this, together with a tender of the money within the period of grace, which the plaintiff undertook to show in the present case. The books might show a premium past due and unpaid, and yet a serious question of law might exist as to the effect of that circumstance upon the company's liability; and so, as we shall see hereafter, it was in this case. The letter next declines either to admit or to deny liability. This is a position which the company had a right to take (2 May on Insurance §471), and which is by no means equivalent to a denial. Lastly, the letter says that blank forms for proofs of death will be furnished if desired. But they were not sent, because they had not been asked for.

In the case of Globe Mutual Life Ins. Co. v. Wolff, 95 U. S. 326, it was said that "The doctrine

of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions." The elements of estoppel are notably absent in the present case; and the defendant ought not to be held to have waived its very important right to consider the question of its liability in the light of such information as proofs of death usually afford.

## SECOND PROPOSITION,

## BASED ON THE FIFTH ERROR ASSIGNED.

The following clause, printed on the back of the receipt given for the first premium, is a part of the contract sued upon, to-wit: "If note be given for the payment of the premium hereon or any part thereof, and same is not paid at maturity, the said policy shall cease and determine."

### STATEMENT.

The trial judge instructed the jury that said clause was not a part of the contract, and the defendant took due exception to that ruling (Tr., 36-37).

The first sentence of the policy, appearing on its face, reads as follows: "The Iowa Life Insurance Company, in consideration of the stipulations and agreements in the application herefor (a copy of which is hereto attached), and of the provisions and requirements upon the next page of this policy, all of which are a part of this contract; and in consid-

eration, also, of the payment of seventy-four dollars and sixty-one cents, being the premium hereon for the first year, hereby promises to pay the sum of three thousand dollars, to Lula T. Lewis (wife of the insured) if living if not living, to the insured's executors, administrators or assigns (less any indebtedness of the insured or beneficiary to this company, together with the balance of any year's premium remaining unpaid), within sixty days after receipt and acceptance, at the company's office in Chicago, Illinois, of satisfactory proofs of the fact and cause of death, within the terms of this policy, of the said Thomas M. Lewis, of Fort Worth, County of Tarrant, State of Texas (the insured under this policy), provided such death shall occur on or before 12 o'clock noon of the fourth day of March, A. D. 1900" (Tr., 26).

Upon the second page of the policy is a provision as follows, it being one of those referred to in the sentence above quoted: "This policy is a contract made and to be performed in accordance with the laws of the State of Iowa, and shall be construed only in accordance with the charter of said company and the laws of said State, and shall not go into effect until the premium hereunder, or a semi-annual or quarterly installment thereof, shall have been actually paid during the lifetime and continuance in good health of the insured. Upon payment of the premium there shall be delivered a receipt signed by the president or secretary, and countersigned by an authorized agent" (Tr., 26-27).

The policy sued upon is of the kind designated by the defendant as a "ten-year convertible term stock" policy. It is dated March 13, 1899. The annual premium is $74.61. The policy was issued in

pursuance of a written and printed application therefor made by the insured under date of March 4, 1899. Said application requested the issuance of a "ten-year convertible term stock" policy, and stated that the premium of $74.61 was to be paid annually. It concluded with a recital as follows: "A note for premium of $74.61 has been paid under this application, to make the insurance binding from the date hereof, on condition that if the risk is not assumed by the company this sum is to be returned, in accordance with the receipt given as voucher for said payment" (Tr., 27).

On March 4, 1899, the insured executed and delivered to S. E. Starn, as agent of the defendant, in partial settlement of his premium, his note reading as follows:

"$37.30. March 4th, 1899.

Six months after date I promise to pay to the order of myself thirty-seven 30-100 dollars, at Ft. Worth, Texas, value received, with interest at 6 per cent. per annum.

T. M. Lewis, M. D."

He endorsed the note in blank as follows: "T. M. Lewis, M. D." (Tr., 27).

On March 5, 1899, S. E. Starn transmitted to the defendant the insured's said application and note with a letter, which in so far as it is material to this matter, reads as follows: "I herewith hand you application of Thomas M. Lewis for $3,000.00, 10-year term con. stock. Also his note to cover settlement." These papers were received by the defendant March 8, 1899, at its office in Chicago (Tr., 27).

The defendant accepted the application March 13, 1899; but did not signify to Thomas M. Lewis its acceptance thereof in any way other than by mak-

ing out and forwarding to its agent, S. E. Starn, for delivery, the policy sued upon, and the premium receipt hereinafter mentioned, which it did March 16, 1899 (Tr., 27).

On March 18, 1899, S. E. Starn countersigned the premium receipt, and delivered it and the policy sued upon to the insured, who received them both at the same time (Tr.,27-28).

The face of the premium receipt reads as follows:

"Iowa Life Insurance Company.

Chicago Office.

Received $74.61, being the first annual premium due March 4, 1899, under policy No. 30140 on the life of Thomas M. Lewis subject to the terms of the contract and the conditions on the back hereof.

Read the notice to policy-holders on the back of this receipt.

This receipt is not binding unless it is countersigned by S. E. Starn, Ag't, Ft. Worth, Tex.

[Signed] C. E. Mabie, President.

Countersigned this 18th day of March, 1899.

S. E. Starn."

The back of said premium receipt reads as follows:

"For terms of mutual agreement, see application and policy.

*Notice to Policy Holders.*

This receipt, to be valid, must be signed by the president or secretary of the company, and in exchange therefor, cash or its equivalent, be given by the holder of the policy, on or before date payment is due and when payment hereon is made to an authorized agent or collector, such agent or collector must countersign at the date of payment to him.

If note be given for the payment of the premium

hereon or any part thereof, and same is not paid at maturity, the said policy shall cease and determine" (Tr.,28).

The policy sued upon is in the form always used by the defendant in making contracts of insurance of the kind designated by it "ten-year convertible term stock" contracts. At the time of issuing said policy it was the defendant's universal practice to issue with its policies premium receipts in form like the one delivered to the insured in this case (Tr., 28-29).

For the first annual premium, the insured gave the above described note for $37.30 and agreed to perform professional services for S. E. Starn to the value of the remaining $37.31. Starn was to furnish professional work to be done by Dr. Lewis in the examination of applicants for insurance and otherwise, and Dr. Lewis was to do it and let Starn have the fees. No work ever was done and no money ever was paid to S. E. Starn or the defendant in pursuance of this verbal agreement. Except that the note was given and the verbal agreement made, as just above stated, the defendant never received, and the insured never paid, anything upon account of the premium for the policy sued upon. S. E. Starn testified that before the issuance of the policy he reported to the defendant his agreement with Dr. Lewis concerning the payment of the premium (Tr., 28.)

ARGUMENT.

The application for the policy and the note for a portion of the premium bear the same date, and were delivered to the company at the same time. The application refers to the note, though by a wrong description. The policy is of the kind applied for, and refers to the application as being a part of the

contract. The policy does not itself constitute a receipt for the first premium, but provides that a separate receipt, executed in a specified way, shall be given therefor. The receipt, so executed, was delivered to the assured with the policy; and both policy and receipt were accepted and retained by him, and sued on by the beneficiary (See her original petition, Tr., 4). The receipt refers to, and is expressly qualified by, the conditions printed on its back, one of which is the clause under discussion. All these papers relate to the same transaction, each evidencing a distinct and necessary part thereof; and if any one of them were eliminated, it would be manifest from an inspection of the others that the record of the agreement was incomplete. From these facts it results that they all should be equally considered as parts of the written contract.

> Bailey v. H. & St. J. R. Co., 17 Wallace 96; Laughlin v. Fidelity Mut. Life Assn., 8 Texas Civ. App. 448; Babbitt v. L. & L. & G. Ins. Co., 66 N. C. 70; Hunt v. Livermore, 5 Pickering 395; Makepeace v. Harvard College, 10 Pickering 298.

The consideration for the granting and periodical renewal of the insurance was an annual premium of $74.91. The policy itself provided that it should not go into effect until the first premium, or a semi-annual or quarterly installment thereof, should be actually paid, and that a receipt should be given for such payment. The company could insist upon these terms, and refuse to contract upon any other, or it could waive them. If it chose to waive them it could do so unconditionally, or upon such conditions as it saw fit to impose. It did agree to waive actual payment in advance, but not unconditionally. Its

agreement for waiver is found only in the receipt. By the receipt it accepted the note and verbal promise in payment of the first premium, but did so subject to the express condition that if the note were not paid at maturity the policy should cease and determine. If this condition be erased, the company will be held to a contract which certainly never had its conscious assent.

It does not appear to have been the theory of either the trial court or the plaintiff that the contract of insurance became complete at any time before the delivery of the policy and receipt. But if it should be argued here that the meeting of minds took place when the company accepted the application, and if the court should be of that opinion, the result would not be changed. The application did not undertake to express completely the terms of the contract; it only described by name the kind of contract desired. Therefore, when the company accepted the application it did so subject to all the terms and conditions usually embraced in its contracts of that kind, of which the clause under consideration was one.

Eames v. Home Ins. Co., 94 U. S. 621; Barre v. Council Bluffs Ins. Co., 76 Iowa 609; DeGrove v. Metropolitan Ins. Co., 61 N. Y. 594; Newark Machine Co. v. Kenton Ins. Co., 50 Ohio St. 549.

## THIRD PROPOSITION,

## BASED ON THE THIRD ERROR ASSIGNED.

The court erred in refusing to permit the defendant to prove that before the delivery of the policy and premium receipt, the form of contract which the assured was to receive was fully discussed between himself and the agent, and that it was agreed and

understood that as a part of his contract he was to receive such a receipt as was given him.

STATEMENT.

While the witness S. E. Starn was on the stand, counsel for the defendant asked him the following question: "When you took this application and delivered this policy, what conversation, if any, did you have with Dr. Lewis about the receipt that you gave him?" To this question counsel for the plaintiff objected, upon the ground that the matter inquired about was irrelevant and immaterial and could not affect the terms of the contract. The court announced that he thought the objection well taken. Thereupon counsel for the defendant offered to prove by the witness upon the stand that before the delivery of the policy and receipt, the form of contract which Dr. Lewis was to receive was fully discussed between the witness and Dr. Lewis, and it was agreed and understood that as a part of his contract of insurance he should receive a receipt in the form of the premium receipt that was delivered to him, and which appears in evidence. The court refused the offer, and sustained the objection to the question; to which ruling of the court the defendant then and there duly took exception. This statement is a copy of the defendant's first exception (Tr., 35-36).

ARGUMENT.

The purpose of the evidence proposed was not to vary the written contract by parol testimony, but to show more clearly than had already been done that he receipt was a part of the written contract. If the language of the papers and the circumstances of their delivery left any doubt as to whether this was so, the

defendant could have removed that doubt by the testimony offered; and it should have been permitted to do so.

Bailey v. H. & St. J. R. Co., 17 Wallace 96, pp. 105 and 108; Cornell v. Todd, 2 Denio 130, p. 133.

## FOURTH PROPOSITION.

## BASED ON THE FIFTH ERROR ASSIGNED.

Under the terms of the contract, the insurance ceased immediately upon the non-payment of the premium note at maturity, without necessity of affirmative action of any kind upon the part of the company.

### STATEMENT.

The clause under consideration reads as follows: "If note be given for the payment of the premium hereon or any part thereof, and same is not paid at maturity, the said policy shall cease and determine" (Tr., 28). The court charged the jury that, assuming this clause to be a part of the contract, yet it was "such a provision as to be taken advantage of would require affirmative action on the part of the company; that is to say, when the note was not paid at maturity the company should have within a reasonable time thereafter notified the insured that in view of the fact that his note given in part payment of the premium upon the policy had not been paid, the policy, which was issued in consideration of such note, ceased and determined." To this charge the defendant excepted upon the ground stated in the proposition (Tr.,37). The premium note given by Dr. Lewis fell due about a month before his death, and was not paid. No affirmative action was shown

to have been taken by the company relative to such default, except that it instructed its agent not to accept payment of the note (Tr., 30).

ARGUMENT.

If this clause forms a part of the contract, it must be given its due effect. The circumstance that it is found in the premium receipt rather than in the note, application or policy cannot nullify it or change its operation. It may be suggested, however, that its insertion in the note would have been less fair to the assured than its insertion in the receipt, which he was to hold, and which he could examine at any time. The language of the stipulation is plain, and needs no construction. Its legitimate result was to cause the insurance to cease immediately upon default in the payment of the note.

Thompson v. Knickerbocker Life Ins. Co., 104 U. S. 252; Laughlin v. Fidelity Mut. Life Assn., 8 Texas Civ. App. 448, writ of error refused by the supreme court, 93 Texas 733; Pitt v. Berkshire Life Ins. Co., 100 Mass. 500; McIntyre v. Michigan State Ins. Co., 52 Mich. 188; Joliffe v. Madison Mut. Ins. Co., 39 Wis. 111; Fowler v. Metropolitan Life Ins. Co., 116 N. Y. 389; Manhattan Life Ins. Co. v. Pentecost, Ky., 49 S. W. Rep. 425; Banholzer v. New York Life Ins. Co., 74 Minn. 387.

## FIFTH PROPOSITION,

## BASED ON THE FIFTH ERROR ASSIGNED.

The company had the right to collect the past-due premium note, without thereby waiving the forfeiture consequent upon its non-payment at maturity.

STATEMENT.

The contrary of the above proposition seemed to be assumed by the trial judge in his charge to the jury, and due exception was taken accordingly (Tr., 37-38). The insurance year began March 4, 1899, and the annual premium was $74.61 (Tr., 26 and 27). The premium note for $37.30 was dated March 4, 1899, and became due six months and three days thereafter (Tr., 27). For the remaining $37.31 of the annual premium, the assured gave his verbal promise to render professional services upon the request of the company's agent. No money ever was paid, and no services ever were rendered, upon account of this promise; nor was any effort ever made to secure such payment or rendition of services (Tr., 28 and 29). Default was made in the payment of the note; and there is some evidence in the record to show that when it was about three weeks past-due the company's agent agreed to accept payment of it. Upon this issue the testimony is conflicting (Tr., 29).

ARGUMENT.

The note was for a little less than half the annual premium, and when it matured a little more than half the policy year had expired. Therefore its amount had been fully earned before the default occurred. Nothing ever was paid, and no attempt ever was made to collect anything, on account of the verbal agreement. If forfeiture of the policy would have the effect of releasing the assured from the payment of the unearned portion of his premium, it would constitute a perfect defense against any subsequent demand for the fulfillment of that agreement. If it would not have such effect, then a fortiori it would not discharge his obligation to pay the earned premium.

and the company could rightfully enforce the forfeiture and still collect on both the note and the oral promise. If the company, while insisting upon the forfeiture, might lawfully collect the earned premium, and the amount thereof was sufficient to cover either the note or the oral promise, it could elect which it would proceed upon. It follows that the existence of the oral agreement in no way diminished the rights which accrued to the company upon the maturity and dishonor of the note.

When a policy becomes forfeit by reason of some breach of condition upon the part of the assured, the insurer can collect the earned portion of the premium without thereby waiving the forfeiture. If it were not so, the assured could at his own pleasure avoid paying for insurance already enjoyed, by violating the contract in a way too serious for the insurer to overlook. In other words, by committing a wrong he could relieve himself from the performance of a duty. In this connection no distinction is perceived between a forfeiture consequent upon non-payment of a premium note at maturity, and a forfeiture resulting from any other breach of condition.

Union Cent. Life Ins. Co. v. Wilkes, 92 Texas 468; Laughlin v. Fidelity Mut. Life Assn., 8 Texas Civ. App. 448; Union Cent. Life Ins. Co. v. Chowning, 8 Texas Civ. App. 455; Joliffe v. Madison Mut. Ins. Co., 39 Wis. 111; Moreland v. Union Cent. Life Ins. Co., Ky., 46 S. W. Rep. 516; Park v. Hilton, Ky., 54 S. W. Rep. 949; Wall v. Home Ins. Co., 36 N. Y. 157; Smith v. Saratoga Co. Mut. Fire Ins. Co., 3 Hill 508; Shultz v. Hawkeye Ins. Co., 42 Iowa 239; Williams v. Albany City Ins. Co., 19 Mich. 451; Limerick v. Gorham, 37 Kansas 739; Smith v.

Continental Ins. Co., 6 Dak. 432; Matthews v. American Ins. Co., 40 Ohio St. 135; Farmers' Mut. Ins. Co. v. Hull, 77 Md. 498.

Of course if the actual collection of the note after default would not waive the forfeiture, an offer by the company's agent to accept payment would not do so. This is a matter which may be of great and possibly controlling importance upon a second trial. Therefore the court is respectfully asked to pass upon it, in case it shall reverse the judgment for some other reason.

## SIXTH PROPOSITION,

## BASED ON THE FIRST AND SEVENTH ERRORS ASSIGNED.

Article 3071 of the Revised Statutes of Texas denies to the defendant, which is a person within the jurisdiction of the State, the equal protection of the laws guaranteed to it by the Constitution of the United States, and therefore is not binding upon the defendant.

### STATEMENT.

The defendant demurred (Tr., 17), upon the ground of the above proposition, to so much of the plaintiff's petition (Tr., 13) as sought to recover statutory damages and attorney's fees. The court overruled the demurrer, and the defendant duly excepted (Tr., 21). The court instructed the jury to include in its verdict against the defendant reasonable attorney's fees and a penalty of twelve per cent. of $3000, the amount of the policy. To this charge the defendant took due exception for the reason stated in the proposition (Tr., 39). The judgment against the defendant includes the sum of $360 as damages

and $500 as attorney's fees (Tr., 22). The plaintiff alleged that the defendant was a corporation organized under the laws of the State of Iowa, doing business as a life insurance company in Texas, and maintaining an office and agency in Tarrant County, Texas (Tr., 11). No issue was made under these allegations, which were confessedly true (R. S., 1265; Tr., 17, 8 and 32). In this action the defendant was sued and served in Texas, and there appeared in obedience to the citation (Tr., 1, 7 and 8). The defendant was not shown, and did not claim, to be within any of the classes exempted from the operation of Article 3071.

ARGUMENT.

The statute under consideration reads as follows:

"In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

The circuit court of appeals for the fifth circuit has recently held that this article has no application to accident insurance companies; because their business is neither life insurance nor health insurance, but is something distinct from them both and so recognized by the legislature.

Fidelity Casualty Co. v. Dorough, 107 Fed. Rep. 389.

By other statutes, subsequently enacted, two

general classes of life insurance corporations are exempted from the provisions of Article 3071, to-wit: "mutual benefit organizations doing business in this state through lodges or councils," and "mutual relief associations organized and chartered under the general incorporation laws of Texas, or which are organized under the laws of any other state, which have no capital stock, and whose relief funds are created and sustained by assessments made upon the members of said associations in accordance with their several by-laws and regulations."

R. S., 3092 and 3096; Sup. Council Am. Legion of Honor v. Larmour, 81 Texas 71; Mut. Res. Fund Life Assn. v. Payne, 32 S. W. Rep. 1063.

The state and federal courts in Texas and the circuit court of appeals at New Orleans have repeatedly held that Article 3071 is valid, or that at least it is obligatory upon foreign insurance companies doing business in the state. In the present discussion inquiry will therefore be made, first as to whether the statute is valid upon its own merits, and then as to whether if not so it is nevertheless binding upon foreign corporations.

Any state may classify the persons within its jurisdiction, and impose a different burden upon the individuals of each class. But such classification must not be based upon arbitrary or irrelevant distinctions. It "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed."

G., C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150; Magoun v. Ill. Tr. & Sav. Bank, 170 U. S. 283; A., T. & S. F. R. Co. v. Matthews, 174 U. S. 96; W. W. Cargill Co. v. Minnesota, 180 U. S. 452.

It cannot be doubted that the equal protection of the laws guaranteed by the Constitution includes "the equal right to resort to the appropriate courts for redress" (Mr. Justice Bradley in Missouri v. Lewis, 101 U. S. 22). Our first inquiry must therefore be answered in the negative, unless there is some real distinction between the obligation of a life or health insurance company to pay its "loss" and the obligation of persons and corporations generally to pay their debts. Furthermore, it must be answered in the negative unless in some way the duty to pay their respective "losses" rests differently upon life and health insurance companies which are without the two excepted classes, and upon accident insurance companies, individual underwriters, and life and health insurance companies within the excepted classes.

The "loss" of a life or health insurance company is nothing but a debt, and its failure to pay the same is merely a breach of contract. This is not within the scope of the police power of the states as commonly understood, or a proper subject for classification.

> G., C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150; A., T. & S. F. R. Co. v. Matthews, 174 U. S. 96; Williamson v. L. & L. & G. Ins. Co., 105 Fed. Rep. 31.

But if it were otherwise, it would be very difficult to point out a satisfactory reason why the duty to pay a life or health insurance claim was more imperative than the duty to pay other debts. The supreme court of Texas never has attempted to do so, though the question has been before it several times. In its first and leading case of Union Cent. Life Ins. Co. v. Chowning, 86 Texas 654, that court rested its

decision upon the right of the states to classify persons, and said nothing about the merits of this particular classification. In Fidelity and Casualty Co. v. Allibone, 90 Texas 660, the court merely stated that the question was distinguishable from that involved in the Ellis case. Upon every other occasion, it has been content to deny a writ of error without delivering an opinion, or, without discussing this question, to render a judgment including the penalties. The courts of civil appeals have usually treated the question as closed for them by the decisions of the supreme court. Hence it is that the three below mentioned are the only cases in which any court has attempted to justify the discriminations of the statute.

> New York Life Ins. Co. v. Smith, 41 S. W. Rep. 680, dissenting opinion; Merchants' Life Assn. v. Yoakum, 98 Fed. Rep. 251; New York Life Ins. Co. v. Orlopp, 61 S. W. Rep. 336.

In the Smith case, the majority held, in an able opinion based upon the decision of this court in the Ellis case, that the statute was invalid; and in a dissenting opinion the first effort was made to defend the classification. The argument there put forth is that the law is a legitimate exercise of the police power; that whenever the legislature finds a business carried on by corporations to be detrimental to the interests of the people, it may discriminate against that business and deal with it in any manner that wisdom or caprice may suggest; and that "the policy of the state seems to be to hamper, discourage, embarrass, and retard" what is known as the old-line life insurance business. The dissenting justice found sufficient reason for this policy in the fact that certain companies had accumulated very large assets, and in

the course of about fifteen years of business in Texas had collected there some twenty million dollars of premiums and paid only about five and a half million dollars of losses; and that the receipts and disbursements of other companies were in like ratio. I cannot bring myself to believe that such an argument requires serious refutation in this court.

In the Yoakum case, the circuit court of appeals attributes to the legislature a wholly different purpose in the enactment of this law. It mentions and illustrates the fact that Texas has no statute requiring that warranties shall be construed as mere representations, and none forbidding physicians to testify about disclosures made to them in their professional capacity. It speaks of the length and cost of some litigations, and of the inequality between the position of a skillfully managed corporation and that of an unlettered peasant. From such a line of reasoning the court deduces the conclusion that "the obvious purpose is to secure a righteous degree of care in writing policies of insurance," and that the classification involved "is therefore not arbitrary, but has reasonable relation to the peculiar features of the business to which it applies." But the legislature did not declare such a purpose, and the law is not an appropriate means of accomplishing it. Certainly it has no bearing on the question of whether communications to physicians shall be privileged, and no tendency to make less stubborn a litigation once begun. It does not equalize the business ability of the corporation and the peasant; but rather it stimulates the search of corporation counsel for defenses that can be relied upon to defeat unjust claims, regardless of their relation or lack of relation to the actual grounds for declining payment. The fact that Texas has not fol-

lowed the example of other states in enacting laws of the character indicated, shows that it is not her policy to so curtail the freedom of contract and of judicial investigation. The law cannot properly be vindicated as tending very remotely to accomplish a purpose which the state repudiates. It is worthy of note, too, that the circuit court of appeals appears to have changed its opinion as to the purpose of the law. In Fidelity and Casualty Co. v. Dorough, 107 Fed. Rep. 389, it says: "There is little doubt that the statute in question imposing penalties upon life and health insurance companies which are so combative as to contend for their supposed rights under written contracts containing resolutory and suspensive conditions, and based on warranties, in the courts of the state of Texas, when the right to so contest is denied to no other class of suitors, is penal in its character."

The decision of the court in the Orlopp case was announced by the same justice who had a few years before dissented in the Smith case, and added nothing of importance to the literature of the subject. But the remarkable fact that in the face of numerous adjudications by the appellate courts of the state to the contrary, the district judge in that case ruled that the law was unconstitutional, and placed "an unreasonable and unconscionable penalty on an insurance company for daring to avail itself of the privilege of litigating its rights," shows how deep-rooted is the feeling of the bench and bar that those adjudications are wrong.

In the opinion of the majority in the Smith case the object of the statute was said to be "to compel such insurance companies to pay their debts for a death claim within the time provided by the policy;"

and in the Walden case (26 S. W. Rep. 1012) its object was said to be "to prevent vexatious delays in the payment of death losses." Aside from the fact that these statements omit all reference to health and endowment insurance, they are manifestly correct; and upon them the law ought to stand or fall. The legislature did not stop to speculate as to whether insurance companies would exercise more care in writing their policies if the courthouse doors were shut against them.

The attempt has been made (British Am. Assur. Co. v. Bradford, 60 Kansas 82) to sustain similar legislation upon the ground that the business of insurance is one clothed with a public interest, and so subject to public regulation. Doubtless it may be subjected to special rules as to those aspects wherein it touches the policy of the state in some way peculiar to itself. The state may always prohibit the making of contracts injurious to the public interests. So, valued policy laws may be justified as tending to prevent reckless insurance with its attendant evils; and standard policy laws, because they make insurance contracts more nearly uniform and certain, and prevent the insertion in them of provisions dangerous to the commonweal. Laws directing that copies of the applications be attached to the policies, laws providing that immaterial breaches of warranty shall not annul the insurance, laws requiring that notice be given of accruing premiums,—all these deal with features of the insurance business that are peculiar to it, and relative to which it may well be specially classed and specially regulated. But in the obligation to perform their contracts and pay their debts, insurance companies do not differ from other natural or artificial persons, and therefore in this regard they

ought not to be classed by themselves. When a lawful contract has been made, the public has no interest in it other than that it shall be fulfilled by both parties; and the courts should be equally open to them both for the double purpose of ascertaining their respective liabilities and enforcing the discharge thereof.

The state of Nebraska has a statute, almost verbatim the same as that of Kansas, allowing attorney's fees, to be taxed as costs, in judgments rendered against insurance companies upon policies of fire, tornado or lightning insurance on real property. The supreme court of Nebraska, in considering that law, said in substance that fire insurance companies were notoriously litigious and prone to contest claims upon frivolous pretexts; and that therefore such legislation was justifiable (Lancashire Ins. Co. v. Bush, 60 Neb. 116). Occasionally one hears a like argument urged in support of the Texas statute. But, in the first place, this argument rests upon a false premise. Life insurance companies have probably less litigation in proportion to the volume of their transactions than any other business institutions. And the percentage of such litigation in which the exempted accident and assessment companies figure is unreasonably large. During the years 1883 to 1899 inclusive, the three leading life insurance companies transacted in Texas a business of over $246,000,000. Volumes 60 to 93 of the reports of the supreme court of Texas show that during the same seventeen years these companies had in that court seven suits relating to losses, in five of which their position was sustained. Volumes 110 to 178 of the reports of this court show that during the same period they had thirteen cases here, in eleven of which their conten-

tions were approved by the court. I do not know to what incomprehensible figures their totals mounted in the meantime; but at the end of 1899 they had outstanding more than a million policies aggregating more than three billion dollars. In the second place, the statute imposes its penalties indiscriminately upon all the companies therein described, without any regard to their individual character for contentiousness or to the nature of their conduct in particular suits pending. Thus companies ordinarily very compliant are punished for resisting in the best of faith what they suppose to be wrongful demands upon their treasuries. Nor are all litigious people so dealt with, but only a few arbitrarily selected. It is as if the legislature had commanded that all red-headed men (to whom tradition ascribes more than their due share of combativeness) should pay damages and attorney's fees when defeated in their law suits. If litigiousness were a proper basis for classification, all plaintiffs and defendants manifesting such a disposition should be included, and no others. But litigiousness is not a proper basis for classification. It is the boast of all free governments that within their domains the rights of the citizen are secure. He who contends in court for his supposed rights does no wrong; but often he renders to society its highest service at an infinite sacrifice of his own convenience. Submissiveness was not the spirit that animated the Boston tea party, or the Lexington farmers who "fired the shot heard round the world." When it becomes the prevailing spirit, we shall have reached that point in our national history "where wealth accumulates and men decay."

It might be supposed that the law was intended to compel the payment of death claims without liti-

gation, because the evidence of the assured would not be available in their support. But it covers sick-benefits and endowments as well as death losses. The plaintiff in a life insurance case always has a great advantage over the defendant because of his more intimate knowledge of the personal history of the assured; and no legislation is needed in this behalf. Moreover, no penalty is imposed upon those who litigate other causes of action with representatives of deceased persons. The law cannot be sustained as devised for the protection of widows and orphans; because it inures to the benefit of administrators, assignees, creditors, and all other holders of death, sick-benefit and endowment claims. If it were argued that life and health insurance policies were intended to provide cash assets for times of emergency, the sufficient answer would be that policies of fire, marine, storm, and accident insurance partake equally of this character, while bank deposits have it to a much greater degree. Yet all these may be contested without any penalty.

It is the duty of every person to pay his rightful debts; but it is not the duty of any one to pay an unjust claim made upon him. On the contrary, as Prof. von Ihering has well demonstrated in his book on The Struggle for Law, we all owe to the community the obligation of resisting such demands. This court decided a few years ago upon high grounds of public morals, that a life insurance company could not even by an express promise bind itself to pay a man's personal representatives a policy matured by his deliberate suicide (Ritter v. Mutual Life Ins. Co., 169 U. S. 139). Few courts would tolerate an attempt to make a policy of life insurance absolutely incontestable from its date (Bunyon on Life Assurance, 115).

Fraud and self-destruction would be wofully multiplied by such encouragement. Yet this partial and unequal statute goes very far toward driving all life and health insurance companies away from the courts, and making their policies virtually incontestable. For no matter how fully convinced a company may be that a claim made upon it is wrongful, it dares not refuse payment unless it has in hand evidence sufficient to force a verdict from jurymen whom the law tells that it is an unworthy suitor.

In this connection the language of Mr. Justice Brewer, arguendo, in the recent case of Cotting v. Godard, 183 U. S. 79, is very significant. "Do the laws," he asks, "secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that, upon a failure to make good that claim or defense, the penalty for such failure either appropriates all his property, or subjects him to extravagant and unreasonable loss? Let us make some illustrations to suggest the scope of this thought. Suppose a law were passed that if any laboring man should bring or defend an action and fail in his claim or defense, either in whole or in part, he should in the one instance forfeit to the defendant half of the amount of his claim, and in the other be punished by a fine equal to half of the recovery against him, and that such law by its terms applied only to laboring men, would there be the slightest hesitation in holding that the laborer was denied the equal protection of the laws? The mere fact that the courts are open to hear his claim or defense is not sufficient, if upon him, and upon him alone, there is visited a substantial penalty for a failure to make good his entire claim or defense. Take another illustration: Suppose a statute that

every corporation failing to establish its entire claim, or make good its entire defense, should as a penalty therefor forfeit its corporate franchise, and that no penalty of any kind except the matter of costs was attached to like failures of other litigants, could it be said that the corporations received the equal protection of the laws?——— Of course, these are extreme illustrations, and they serve only to illustrate the proposition that a statute (although in terms opening the doors of the courts to a particular litigant) which places upon him as a penalty for a failure to make good his claim or defense a burden so great as to practically intimidate him from asserting that which he believes to be his right is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws."

The parties to such a contest do not enter it upon equal terms. A sum ranging anywhere from twenty-two per cent. to thirty-five per cent. of the amount in controversy is given to the plaintiff as a prize and exacted from the defendant as a penalty, if the plaintiff wins; but if the defendant wins it gets no prize, and the plaintiff pays no penalty.

In the Ellis case, the question was whether a statute allowing to the plaintiff an attorney's fee of $10 was valid. The court held that it was not, but three justices dissented upon the ground that attorney's fees might be allowed as costs. The law now under consideration gives to the plaintiff not only an attorney's fee in such sum as the jury may fix ($500 in this case), but also twelve per cent. of the policy as punitory damages, all in addition to six per cent. interest and the costs of the court.

But even if it were possible to distinguish life and health insurance losses from other debts, surely

there exists no legitimate ground for the discrimination which this statute makes among those who sustain such losses.

In the first place, the operation of the law is confined to corporations; individual insurers are not affected by it. Individual life underwriting is of course now unusual; but it is neither impossible nor unprecedented. In the early days of the business, life policies were commonly, if not exclusively, subscribed by one or more individuals, after the manner of the marine underwriters at Lloyd's (Bensa, Il Contratto di Assicurazione nel Medio Evo, 228, 232; Wittingham v. Thornborough, 2 Vernon 206; Lord v. Dall, 12 Mass. 115). The debts being of the same character, why is the duty of a corporation to pay any more imperative than that of an individual.

In the second place, "mutual benefit organizations doing business in this state through lodges or councils" are exempt from these penalties. The court can take judicial notice of the generally understood fact that there are but few stock companies engaged in writing life insurance in this country. Of the seven largest American companies, only one has any capital stock, the other six being mutual. These companies are "mutual benefit organizations." The purpose of their existence is to obtain for their members the benefits of life insurance at actual cost, and not to earn profits for shareholders. The only difference between them and those exempted is that they do not transact their business through lodges or councils. What conceivable relevancy has this distinction to the matter of debt-paying? They are alike in the circumstance that they are corporations issuing life insurance policies and charging premiums therefor. They are competitors in business. Yet in

contesting doubtful claims, one risks only the ordinary costs and expenses of litigation, while the other hazards in addition to them the heavy penalties named in this law. Nor does there appear to be any more reason for a distinction in this matter between mutual companies and those which have capital stock.

In the third place, "mutual relief associations—— which have no capital stock, and whose relief funds are created and sustained by assessments made upon the members," are exempt. The only distinction between these associations and other mutual life insurance companies, is that they get their funds from after-death assessments while the others get theirs from advance premiums. This difference may well affect the question as to what is a reasonable time after the death of the assured within which to make the claim mature; but it can not have any proper bearing upon the duty of the respective corporations to pay their debts when they become due.

In the fourth place, according to the decision of the circuit court of appeals, accident insurance companies are not included in either class of corporations named in the statute, and therefore are exempt from its penalties. What possible basis can there be for such a discrimination? Suppose a case in which this defendant and an accident insurance company have policies of $10,000 each upon the same life. The circumstances attending the death of the assured show that it was either suicidal or accidental. Both companies are convinced that it was suicidal, and both refuse payment and defend upon that ground alone. The two cases are consolidated and tried as one. The jury adopts the theory of accident. Upon its verdict are based two judgments, one against the accident insurance company for $10,000 and interest

and costs, and the other against this defendant for $10,000 and interest and costs, and in addition thereto $1,200 damages and $1,000 or $1,500 attorney's fees. Is not such a result in the highest degree unreasonable and unjust?

It has sometimes been suggested that the legislature meant to impose the penalties upon corporations organized for purposes of profit, and to exempt those of benevolent aim. But this could not have been the legislative intent, even if such a difference would warrant the classification. As above mentioned, it is known of all men that most of the old-line life insurance business of America is done by mutual companies not organized for profit; yet these are subjected to the penalties. It is perhaps equally well known that in this country nearly all the accident insurance is underwritten by stock companies created for the profit of their shareholders; yet these are exempt from the penalties.

The authorities were so thoroughly considered by this court in the Ellis and Matthews cases that any general review of them here would be out of place. The later decisions of the courts have contributed little to the discussion. With only a few exceptions they have been founded upon the Ellis case, not merely in recognition of its binding force but with hearty approval of its reasoning. So far as I have observed, no court has yet had occasion to adopt the distinction drawn by Mr. Justice Brewer in the Matthews case. It could have been, but was not, applied to the facts of Paddock v. Mo. Pac. Ry. Co., 155 Mo. 524. In that case, the supreme court of Missouri held unconstitutional a statute allowing attorney's fees to plaintiffs in actions to recover damages for injuries to stock occurring in consequence of

the failure of a railway company to fence its track as required by law. But this distinction has no bearing upon the present controversy, which is governed by the general principles announced in the Ellis case and reiterated in the Matthews case. The supreme court of Colorado, in Davidson v. Jennings, 60 Pac. Rep. 354, and a little earlier the supreme court of Alabama, in Randolph v. Builders' & Painters' Supply Co., 106 Ala. 501, held unconstitutional statutes allowing attorney's fees to the successful plaintiffs in suits to enforce mechanic's liens. In Johnson v. Goodyear Min. Co., 127 Cal. 4, the supreme court of California held invalid a statute giving to employes of corporations liens and attorney's fees in suits to enforce the same.

Article 8012 of the Revised Statutes of Missouri (of 1899) reads as follows: "In any action against any insurance company to recover the amount of any loss under a policy of fire, life, marine or other insurance, if it appear from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not exceeding ten per cent on the amount of the loss, and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict." The court will notice that this statute is less objectionable than the one now under examination. It applies to all kinds of insurance companies, and allows the penalties only in case of their vexatious refusal to pay. Yet it has been held unconstitutional in Williamson v. L. & L. & G. Ins. Co., 105 Fed. Rep. 31. The opinion of Judge Phillips is interesting and cogent, especially that part of it, covering several pages, in which he refutes the proposition that the enforce-

ment of insurance contracts may come within the police power. Quoting from State v. Greer, 78 Mo. 188, he says that the police power is a system of precaution " 'for the prevention of crimes or of calamities,' and police regulations 'are such provisions of the law as are designed to protect the lives, limbs, health, comfort, and quiet of citizens, and to secure them in the enjoyment of their property. And the police power can be invoked for an interference with one's dominion over his own property to prevent such use of it by him, or its continuance in such condition, as would be detrimental to the community, and on no other grounds.' " He adds that "The business of insurance is not immoral. It spreads no contagious disease. It does not affect the public health. It does not affect the public policy of the state, nor threaten the community with any public calamity or danger."

Section 2140 of the Georgia Civil Code provides that if any insurance company refuse to pay a loss within sixty days after demand, it shall be liable, in addition to the loss, for not more than twenty-five per cent. of its amount and all reasonable attorney's fees; provided it shall be made to appear that the company's refusal of payment was made in bad faith. This statute, like that of Missouri and radically unlike that of Texas, makes no discrimination among insurance companies of different kinds, and punishes them only when they are found to have acted in bad faith. But the supreme court of Georgia, in a recent decision, quoting from numerous authorities and citing the Ellis case as conclusive, held it to be violative of the equal protection clause of the Fourteenth Amendment (Phenix Ins. Co. v. Hart, 112 Ga. 765).

From the foregoing considerations it seems clear

to me that the Texas statute denies the equal protection of the laws to life and health insurance companies not exempted from its provisions; and of such is the defendant.

2.

Our second inquiry is whether, if the statute be violative of the Constitution, it is nevertheless binding upon foreign corporations as a condition of their right to do business in Texas. It has been so held in some cases.

> Mutual Life Ins. Co. v. Walden, 26 S. W. Rep. 1012; Merchants' Life Assn. v. Yoakum, 98 Fed. Rep. 251; New York Life Ins. Co. v. Smith, 41 S. W. Rep. 680, dissenting opinion; contra, the majority opinion.

The argument is, that Texas had power to condition in whatever way she chose the defendant's right to transact business within her territory; that the statute was enacted before the policy was issued; and that, therefore, by entering the state and issuing the policy the defendant agreed to be bound by the statute.

The defendant is a life insurance corporation domiciled in Iowa, and had no inherent right to do business in Texas. The latter state could exclude it, or could admit it upon conditions; and for the present it will be assumed that her power to impose express conditions was unlimited.

Article 745 of the Revised Statutes as amended by chapter 119 of the General Laws of 1897 provides a method whereby a foreign corporation may obtain a permit to do business in Texas, and that "such corporation on obtaining such permit shall have and enjoy all the rights and privileges conferred by the

laws of this state on corporations organized under the laws of this state." In S. A. & A. P. Ry. Co. v. S. W. Tel. &. Tel. Co., 93 Texas 313, p. 322, the supreme court says of this provision: "Thus the state adopts the foreign corporation upon the terms stated in the law and makes it equal to domestic corporations." While this article does not apply directly to the admission of foreign insurance companies, it shows what is the general policy of the state in dealing with non-resident corporations admitted within its limits.

Article 3071 itself does not distinguish between foreign corporations and those of domestic origin. They stand upon exactly the same plane. As originally enacted (Sec. 9, Ch. 145, General Laws of 1874), it applied only to life insurance companies incorporated elsewhere than in Texas. It was changed to its present form in 1879, becoming Article 2953 of the Revised Statutes of that year; and thus it was made applicable to health insurance companies as well as life, and to domestic corporations as well as foreign.

The terms prescribed for the admission of life and health insurance companies doing business otherwise than upon the assessment plan are found in Articles 3062-3069 of the Revised Statutes. The payment of damages and attorney's fees to persons obtaining judgments against them is not one of the conditions there specified. Article 3071, requiring such payment, is simply a part of the general statutes; and it has no force as a condition binding upon the defendant other than such as it derives from that fact. It is one of twenty articles, 3070-3089, relating to general features of the insurance business. To illustrate, 3070 is a venue law; 3072 provides for the

revocation of the license of any life or health company which fails to satisfy an execution against it within thirty days; 3073 prohibits the issuance of life policies by companies engaged in fire, marine, or other insurance business; 3075 limits the amount which fire, marine and inland insurance companies may expose to loss in single risks; 3076 limits their right to own real estate; 3077-3081 provide a remedy for the impairment of the capital of domestic companies; 3083-3085 require annual statements; 3087-3088 regulate the payment of dividends; and 3089 is a valued policy law. Most of these articles relate to all companies doing business in Texas, without reference to their domicile.

By Articles 3048-3049 it is made the duty of the insurance commissioner to issue a certificate authorizing any insurance company to do business in Texas, when satisfied that it has complied with the law and that it has the requisite financial strength. The company is not required to make any promise about paying attorney's fees and damages; and obviously it would have no occasion either to pay them or to become liable for their payment until after it had been admitted to the state and begun to transact business.

Nor have the Texas courts bound this court by an interpretation of the article as one of the terms of admission of foreign companies to the state. The supreme court never has held it to be so, having placed its decisions upon the ground that the law is valid. The court of civil appeals for the second district held in the Walden case by a bald assumption without reasons given, that Article 3071 was found among the prescribed conditions upon which life insurance companies might do business in Texas, and that a foreign corporation was not in position to com-

plain of these requirements. Afterwards, in the Smith case, that court discussed and overruled the Walden case, and held that the article was not one of the conditions upon which foreign corporations were admitted, and that it was like any other statute, ——binding if valid. Probably the Orlopp case (61 S. W. Rep. 336) should be construed as a return by that court to its original doctrine. All the other courts of civil appeals have simply followed the decisions of the supreme court that the law is valid. The five courts of civil appeals in Texas are intermediate courts, whose rulings and interpretations are not authoritative.

Of course foreign corporations entering Texas for the transaction of business thereby subject themselves to her laws. But to draw from this familiar doctrine the conclusion that Article 3071 is binding upon them is a sheer begging of the question. If the article is unconstitutional, it is not law; but is only a fruitless attempt of the legislature to do something which was beyond its power. Suppose that when the defendant entered Texas there had been upon the statute rolls, or in the state constitution, some other article, of superior authority and entirely inconsistent with Article 3071; would any one say that it was bound by 3071, and not at liberty to point out in court the inconsistency of the two? In the words of Chief Justice Taney, "The Constitution of the United States, and every article and clause in it, is a part of the law of every state in the Union, and is the paramount law." (Prigg v. Pennsylvania, 16 Peters 539, p. 628). The Fourteenth Amendment is a part of the law of Texas; and the defendant is claiming here only the right to show that it is inconsistent with Article 3071.

So far as my observation has extended, never, except in these Texas cases, has it been suggested that a corporation left behind it the protection of the Constitution when it crossed the borders of the state of its origin. At the suit of a New York corporation, the supreme court of Georgia held unconstitutional a statute resembling that now under consideration; and the circuit court in Missouri did the like for an English corporation. The Kansas and Nebraska decisions hereinbefore referred to as sustaining similar legislation do not rest upon any such ground, though the corporations involved were British. In both the leading cases wherein the Texas supreme court declared the law to be valid upon its own merits, the litigating companies were foreign. This court has not hesitated, whenever the facts required it, to step across the path of states seeking to deprive foreign corporations of their property without due process of law, or of their right to remove causes to the federal courts.

C., M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418; St. L. &. S. F. Ry. Co. v. Gill, 156 U. S. 649; Smyth v. Ames, 169 U. S. 466; Home Ins. Co. v. Morse, 20 Wallace 445; Barron v. Burnside, 121 U. S. 186.

The equal protection clause of the Fourteenth Amendment, by its plain terms, extends to all persons who are within the jurisdiction of the state, and not to those only whose homes are there. That corporations are persons within the meaning of this clause has long been settled.

The case of Fire Assn. of Philadelphia v. New York, 119 U. S. 110, lends no support to the doctrine that foreign corporations are bound by all the statutes of a state without regard to their constitution-

ality. The logic of that case seems to me to be this. The Fire Association was a Pennsylvania corporation, which first entered New York in 1872. At that time there was upon the statute books of New York a law requiring that all insurance companies of other states doing business in New York should pay to it the same tax (when higher than the regular New York rate) which New York insurance companies were required to pay in such states. In 1873 Pennsylvania enacted that every foreign insurance company should report each January the amount of premiums received by it in Pennsylvania during the preceding calendar year, and pay a tax of three per cent. thereon as a condition of its right to continue business in the state. The Pennsylvania tax rate of three per cent. therefore became engrafted upon the New York law in 1873. The Fire Association did business in New York by virtue of annual licenses. At the beginning of each fiscal year it occupied the position of a foreign corporation seeking admission to the state for that year. Each time the state met it at the threshold with the proposition that it would be admitted upon condition that it pay into the state treasury three per cent. of its premiums collected in New York, a condition to which there is no constitutional objection. It seems to have accepted the proposition from year to year, and to have paid its tax accordingly. But in 1882 it refused to pay the tax on the premiums of 1881, and to collect this tax the action was brought. When it applied for and accepted its license to do business in New York for the year 1881 (or perhaps 1882), it impliedly agreed to pay the tax; and the court held that it should do so. There was here no room for the operation of the Fourteenth Amendment. It was a lawful contract

between the state and the company. The state said to the company, which was then as to this particular matter a person without its jurisdiction, that in consideration of the payment of a certain sum of money, it would admit the company within its boundaries for one year; and the company accepted the offer. The present case is very different. Here the court is asked to decide that when the defendant has been admitted to the state, and under its license has transacted business with its citizens, and controversies have grown out of such transactions, the state may deny to the defendant the equal protection of the laws in the settlement of those controversies.

The case at bar is wholly unlike that of Waters-Pierce Oil Co. v. Texas, 177 U. S. 28. When the Oil Company entered Texas, the state had a law forbidding certain combinations in restraint of trade, and providing that foreign corporations violating the same should be prohibited and enjoined from doing business there. Obviously this made abstinence from such combinations an express condition of the right of the Oil Company to transact business in Texas; and the suit was brought to enjoin it from continuing business, on the ground that the condition had been violated. The court held that no question of discriminations was presented by such a record. The situation was somewhat analogous to that found in Doyle v. Continental Ins. Co., 94 U. S. 535. There it was held that although the state of Wisconsin could not prevent a foreign corporation from removing causes to the federal courts, it could lawfully revoke the license of one which had done so.

This case is likewise plainly distinguishable from that of New York Life Ins. Co. v. Cravens, 178 U. S. 389. There it appeared that the legislature of Mis-

souri had enacted that no life insurance policy upon which two annual premiums had been paid should be forfeited for non-payment of premiums; and that in case of lapse, such a policy should be commuted for paid-up insurance. The general validity of the statute was not questioned. The Insurance Company's contention was, that as this was an interstate contract, the parties thereto could elect to be bound by the laws of either state; that they had chosen to contract under the laws of New York; and that the judgment of the supreme court of Missouri to the effect that they could not do this had deprived it of its freedom of contract without due process of law. In other words, the Insurance Company contended that because it was a foreign corporation, it could do business in Missouri and claim for such business an exemption from the valid laws of that state. The court held that such a claim was without foundation. But in the case at bar, the defendant admits that as to its Texas business it is bound by the laws of Texas; and it only claims the right to test in the appropriate tribunals the question as to whether a certain provision is really one of those laws.

So far in this argument it has been assumed that the state of Texas had unlimited power to name express conditions upon which alone the defendant should be admitted within its borders. But in fact it had not the power to impose conditions "repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

Lafayette Ins. Co. v. French, 18 Howard 404;

Home Ins. Co. v. Morse, 20 Wallace 445; Barron v. Burnside, 121 U. S. 186; Blake v. McClung, 172 U. S. 239; Dayton Coal & Iron Co. v. Barton, 183 U. S. 23.

The controlling principle seems to be that when for reasons of public policy an important right is guaranteed to a person by the Constitution or laws of the United States, he can not either expressly or by implication bind himself to waive that right. His agreement to do so is invalid, because the interest of the nation forbids its enforcement. As was said by Mr. Justice Hunt in Home Ins. Co. v. Morse: "Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws of all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights."

Whatever force there is in the argument that the penalty statute was imposed by the state as a condition of the defendant's right of entry, is derived from the agreement to waive its constitutional guaranty of equal protection thought to be involved in its acceptance of the state's license. For if the effect of the statute is to deny the equal protection of the laws to the defendant while within the jurisdiction of the state, then, considered as a law, the statute is null and void; and it can act, if at all, only as evidence of the terms of an implied contract between the state and the defendant.

So important is the right of access to the courts, that one can not bind himself in advance by an agreement not to resist any suits of a particular kind which may be brought against him; or by an agreement to submit to arbitration whatever disputes may grow out of a transaction.

Home Ins. Co. v. Morse, 20 Wallace 445; Pope Mfg. Co. v. Gormully, 144 U. S. 224; Thompson v. Charnock, 8 Term Rep. 139; Rowe v. Williams, 97 Mass. 163; Del. & Hud. Canal Co. v. Pa. Coal Co., 50 N. Y. 250.

The right to the equal protection of the laws is one guaranteed by the Constitution of the United States; and the essence of that right is the privilege of appealing on equal terms to the courts for protection against unjust demands. It is a right vastly more important to the individual and to the public than that of removing causes from state tribunals to federal. All the reasons which have impelled this court to hold of no effect an express agreement to waive the privilege of removing causes, apply with double force to the proposition that an implied agreement to waive the right of equal protection is nugatory. In this connection I beg to quote from Mr. Justice Harlan's dissenting opinion in Fire Assn. of Philadelphia v. New York, 119 U. S. 110. The court thought his language inapplicable to the facts of that case, but to this discussion it appears exceedingly appropriate. "Can it be," he asks, "that a corporation is estopped to claim the benefit of the constitutional provision securing to it the equal protection of the laws simply because it voluntarily entered and remained in a state which has enacted a statute denying such protection to it and to like corporations from the same state? Is the right to that protection any less valuable or fundamental than the right to remove a suit into the courts of the Union for trial? Will it be held that an express agreement by a corporation not to exercise the latter right is void and not enforcible, but that a local statute denying the equal protection of the laws to a corporation will

be upheld, simply because that corporation came within the jurisdiction of the state which assumed to make such denial, and received from her officers, acting in conformity with her laws, a certificate of its right to transact business there? Will effect be given in one case to what (erroneously, I think) is called an implied agreement to surrender a constitutional right, while an express agreement in the other to surrender a constitutional right is held to be invalid?"

In the first part of this argument I endeavored to show that the statutory classification was arbitrary and unconstitutional. If it be so, the case appears to me to come fairly within the principle established in Home Ins. Co. v. Morse and Barron v. Burnside, and recognized at the present term in Dayton Coal & Iron Co. v. Barton, 183 U. S. 23, where Mr. Justice Shiras, delivering the opinion of the court, said: "We do not care, however, to put our present decision upon the fact that the plaintiff in error is a foreign corporation, nor to be understood to intimate that state legislation, invalid as contrary to the Constitution of the United States, can be imposed as a condition upon the right of such a corporation to do business within the state." In that event, the requirement of the statute would not have bound the defendant even if it had been made one of the express terms of admission. A fortiori, it does not bind as a general statute not made an express condition of the defendant's right to enter Texas.

Probably the defendant in error will rely upon the refusal of this court to grant a writ of certiorari in the case of United States Life Ins. Co. v. Ross, at the last term, as settling this constitutional question. The Ross case was one which could have been brought directly here; but the defendant com-

pany chose to try its chances in the circuit court of appeals. It was not entitled to have its case determined by both courts (Loeb v. Trustees of Columbia Twp., 179 U. S. 472). No written opinion having been delivered, it seems to me probable that the writ was refused for this reason, and not upon consideration of the merits of the questions involved.

## SEVENTH PROPOSITION.

## BASED ON THE FIRST AND SEVENTH ERRORS ASSIGNED.

**Assuming Article 3071 of the Revised Statutes to be a valid law, still the defendant is not liable for the damages and attorney's fees thereby imposed, because no demand was made upon it for payment of the loss before the suit was begun.**

### STATEMENT.

The defendant demurred (Tr., 17) to so much of the plaintiff's petition (Tr., 13) as sought to recover the statutory damages and attorney's fees, upon the ground that it showed no demand for payment of the policy sued upon. The demurrer was overruled, and due exception was taken (Tr., 21). The court instructed the jury to include damages and attorney's fees in its verdict; and the defendant excepted to the charge because there was no evidence showing that the plaintiff at any time before or after the institution of the suit, or otherwise than by the mere fact of suit, made demand upon the defendant for the payment of the amount due under the policy sued upon (Tr., 39). The judgment as rendered includes $860 for damages and attorney's fees (Tr., 22). The plaintiff's petition did not allege any demand made for payment (Tr., 11-16). Except by the in-

stitution of this action, the plaintiff never at any time made demand upon the defendant for payment of the sum due her on account of the contract of insurance (Tr., 35). She had, however, made such requests for blank forms for proofs of death and received such responses to her requests, as are set forth in Section 2 of the bill of exceptions (Tr., 23-26), and stated under the first proposition of this brief (ante, 9-14).

ARGUMENT.

The statute reads as follows:

"In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

The statute inflicts its penalties only in case the company liable for a loss "shall fail to pay the same within the time specified in the policy, after demand made therefor." No demand ever having been made in this case, the liability for the penalties never attached.

The theory upon which the trial judge based his ruling was that of waiver. He construed what took place relative to proofs of death as a denial of liability on the part of the defendant, and held that this would amount to a waiver of the demand required by the statute. I have endeavored to show in discussing the first proposition (ante, 9-21), that the defendant never denied liability prior to the filing of the

suit. If it did not, then of course it did not thereby waive the demand.

But if the court should be of opinion that there was such a denial of liability as would relieve the plaintiff from the necessity of furnishing proofs of death, still it is believed that the penalties were not incurred by the act. Huge waivers can be constructed out of very slender materials, but this one seems too great. Waiver is the voluntary relinquishment of a known right; and men are not quick to consent that heavy penalties be imposed upon them, or to waive the conditions precedent of such penalties. Courts ought therefore to be careful about implying an intention to do so from acts done with reference to entirely different matters. The statute is highly penal in its character; and it does not say that denial of liability shall bind the company to pay damages and attorney's fees. The elementary rule is that such a statute will not be extended beyond its letter, and that any one claiming under it must bring himself strictly within its terms (Sutherland on Statutory Construction, § 358).

This question has arisen before only in the case of Northwestern Life Assurance Co. v. Sturdevant, 59 S. W. Rep. 61. There the court of civil appeals for the fourth district held that the right to damages and attorney's fees did not accrue to the plaintiff without previous demand for payment, notwithstanding the defendant's denial of liability. In delivering the unanimous opinion of the court, Chief Justice James said: "This statute is penal in its nature, and the right to recover under it is strictly statutory, and the plaintiff did not bring herself strictly within its provisions. Schloss v. Railway Co., 85 Texas 603, 22 S. W. 1014. It does not appear that any demand

had been made on the company for payment before suit, the only demand being the suit itself. It is contended that this demand was unnecessary, because the defendant's attitude has, ever since the attempted forfeiture, been one of refusal, of repudiation of the policy, and denial of its liability. ——— But we think it matters not how vigorously the insurance company may have denied its liability or asserted its determination not to pay. This cannot be made to take the place of what this statute prescribes as essential to the accrual of those penalties. These acts do not constitute a failure to pay the loss after demand made therefor, when there has been no demand. If the legislature had intended that a suit on the policy was the demand provided for, and the defense of the suit constituted a failure to pay after demand, it was useless to provide for a demand and failure to pay in order to render the company liable for these items. It would have been sufficient to provide that defendant would be liable for them if payment was not made in a reasonable time after suit. We think it was the intention of the legislature to require a demand to be made after the policy became due, and before a suit."

## CONCLUSION.

To recapitulate, the plaintiff in error contends that there is no right of recovery against it for any sum, because no proofs of death were furnished (first proposition), and because the policy had become void before the death of the insured (second, fourth and fifth propositions). It contends, moreover, that it is not liable for damages and attorney's fees, because the statute allowing them is unconstitutional (sixth proposition), and because, if valid, its conditions have

not been met (seventh proposition). For these reasons, and because of an error in rejecting testimony (third proposition), it prays that the judgment of the circuit court be reversed.

Respectfully submitted,

MAURICE E. LOCKE,

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